IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1125

A. Y. ALLEE, ET AL., *Appellants,*

v.

FRANCISCO MEDRANO, ET AL., *Appellees.*

On Direct Appeal from the United States Three-Judge District Court for the Southern District of Texas

BRIEF AMICUS CURIAE ON BEHALF OF BROWN & ROOT, INC., THE DOW CHEMICAL COMPANY, SAN ANTONIO PORTLAND CEMENT COMPANY, EASTEX INC., K. O. STEEL CASTINGS, INC., E. I. DU PONT D'NEMOURS & COMPANY, GULF OIL CORPORATION, ASSOCIATED GENERAL CONTRACTORS—DALLAS BUILDING CHAPTER, EXXON, INC., SHELL OIL COMPANY, AND LONE STAR STEEL CORPORATION, URGING REVERSAL

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The employers named above respectfully submit their brief *amicus curiae* in support of Appellants, having obtained consent to do so from all parties. Copies of such consents are made a part hereof as Appendix A.

QUESTION PRESENTED

These *amici curiae* limit their arguments to the issue of whether the three-judge district court erred in declaring unconstitutional and enjoining the enforcement of Article 5154(d), Section 1, Vernon's Texas Civil Statutes, as an unlawful encroachment on First Amendment rights.

INTEREST OF AMICI CURIAE

The district court's judgment is of major significance to all employers within the State of Texas. The *amici curiae* are employers with substantial business operations within the State dealing regularly with labor organizations and have a crucial interest in the district court's opinion invalidating and declaring unconstitutional Section 1 of Article 5154(d), Texas Revised Civil Statutes, which defines and regulates mass picketing in connection with labor disputes. The decision has had and, unless reversed, will continue to have a great and injurious impact on industrial peace in Texas. It improperly undermines legitimate State interests in the safe and peaceful conduct of labor picketing, strikes, work stoppages and related labor disputes, to the detriment of the public, labor and industry.

The *amici curiae* were not parties to this case, but, because their interests will be seriously affected by the district court's decision, they should be given an opportunity to be heard and to demonstrate to this Court that Section 1 of Article 5154(d) should not be declared unconstitutional, since it properly safeguards the State's interest in peace and harmony in a labor dispute while preserving the right to engage in effective peaceful picketing as a means of communication.

SUMMARY OF ARGUMENT

The decision of the court below is incorrect for two reasons. First, that court ignored or misapplied the principles of federal restraint and noninterference with state proceedings as announced by this Court. Secondly, the court below erred by deciding the constitutionality of Article 5154(d), Section 1 on the incorrect premise that the article regulates "public issue" picketing. Properly, the court below should have construed Article 5154(d) in the true context of its narrow purpose, *viz*, achieving a reasonable balance between the State's legitimate interest in the peaceful conduct of labor disputes and individual rights to effective communication through picketing. A fair balance having been accomplished, the statute should not have been declared unconstitutional.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FAILING TO ADHERE TO RECOGNIZED DOCTRINES OF JUDICIAL RESTRAINT AND NON-INTERFERENCE WITH STATE CRIMINAL PROCEEDINGS, THUS UNNECESSARILY DECIDING COMPLEX CONSTITUTIONAL ISSUES AND NEEDLESSLY INTERFERING WITH LEGITIMATE STATE PROCESSES

Beginning with *Hayburn's Case*, 2 Dall. 409 (1972), and culminating in Justice Brandeis' eloquent statement in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), this Court has recognized the obligation of federal courts to exercise restraint in constitutional determinations. Among the principles announced by Mr.

Justice Brandeis, and reaffirmed in *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), is the rule that the Court will not anticipate a question of constitutional law in advance of the necessity of deciding it, nor will the Court void a statute without first ascertaining whether a construction is fairly possible by which the question of constitutionality may be avoided. The nuances of these guidelines and the corollaries which flow from them have developed into a recognized and commendable reluctance of federal courts to wield their excising powers over state statutes books.[1]

Cognate to the doctrine of judicial restraint is the norm of noninterference with state proceedings. Although in rare situations a federal court is granted leave to intervene, such intrusion has always been firmly bounded by restraints, both judically self-imposed, *e.g.*, *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), and statutorily decreed, *e.g.*, 28 U.S.C. §§2281, 2282, 2283, 2284, 1253, 1341, 1342. In *Ex Parte Young*, 209 U.S. 123 (1908), the "fountainhead of federal injunctions against state prosecutions," this Court characterized the power and its proper exercise in broad terms. However, as the Court later observed in *Dombrowski v. Pfister*, 380 U.S. 479 (1965),

> . . . considerations of federalism have tempered the exercise of equitable power, for the Court has

1. Lower courts have traditionally recognized that they must be cautious in resolving complex constitutional issues through the use of injunctive or declaratory relief. *See, e.g.*, McCahill v. Borough of Fox Chapel, 438 F.2d 213, 216 (3d Cir. 1971); Cole v. McClellan, 439 F.2d 534 (D.C. Cir. 1970); Lampkin v. Connor, 360 F.2d 505 (D.C. Cir. 1966); and Mora v. Brownell, 231 F.2d 579 (9th Cir. 1955).

> recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial applications of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. 380 U.S. at 484-5.

The parameters of nonintereference after *Dombrowski* were less than certain,[2] causing some to believe that lower federal courts were free to roam through county courthouses to meddle in the administration of criminal justice. However, proper balance in the delicate scheme of federalism was regained by the opinion in *Younger v. Harris,* 401 U.S. 37 (1971) and its companion cases.

In *Younger,* the Court stressed that only under most unusual circumstances should injunctive relief be granted in a federal court against a pending state criminal prosecution. Contemporaneous with *Younger v. Harris,* the Court in *Samuels v. Mackell,* 401 U.S. 66 (1971), addressed itself to the implications of this attitude for declaratory judgment actions and held that "under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate," noting that " . . . the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment,

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2. *See* Maraist, *Federal Injunctive Relief against State Court Proceedings: The Significance of Dombrowski,* 48 Tex. L. Rev. 535 (1970).

and where an injunction would be impermissible under the principles, declaratory relief should ordinarily be denied as well." *Id.* at 69, 73.

The *Younger* and *Samuels* cases are more than technical exercises in avoiding conflicts between judicial systems. Both decisions go to the very core of the concept of "our federalism,"

> . . . [a] system in which there is sensitivity to the legitimate interests of both State and National government, and in which the National government, anxious though it may be to vindicate and protect federal rights and federal interests, *always endeavors to do so in ways that will not unduly interfere with legitimate activities of the States. Younger v. Harris, supra,* at 44 (emphasis added).

In sum, *Younger* "made it clear that *Dombrowski* did not displace the traditional limitations on federal intervention in state criminal cases, and thus ended the belief that *Dombrowski* should be interpreted broadly." Note, 59 Calif. L. Rev. 1949 at 1550 (1971).

While dutifully repeating the *Younger* tests and making findings to support them, the court below obviously captured only the letter, not the spirit, of *Younger* and *Samuels. Younger* (as was even *Dombrowski*) is a forceful call for judicial restraint in the interest of comity and federalism; to which the *Medrano* opinion pays lip service but in fact answers with an untoward display of federal judicial excess.

The *amici curaie* herein hold no brief for the alleged actions of the defendant peace officers of the State of Texas. If they engaged in a course of conduct which

amounts to the "bad faith" or "harrassment" defined in *Younger*, then indeed the *amici curiae* agree that the federal court should be open to them. But the court below erred in grasping the subject matter by means of the *Younger* tests, and then plunging headlong to unwarranted extremes.[3]

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3. As Part II of this Brief makes clear, Article 5154(d), Section 1 is not facially overbroad; it is a precisely drawn and legitimate state regulation of labor picketing. The court below professes that it

> . . . stayed its hand for some four and one-half years. During this time we have not been shown a state interpretation narrowing or voiding these statutes on federal constitutional grounds in the intervening years. If abstention was ever appropriate it is no longer. Since we find no special circumstances requiring abstention or further delay, we proceed to the merits of the plaintiffs' constitutional challenge. 347 F. Supp. at 621.

However, the courts of Texas have done precisely what the court below chooses to gainsay, Geissler v. Coussolis, 424 S.W.2d 709 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.) and discussion, *infra*. The dissent of Justice Harlan in NAACP v. Button, 371 U.S. 415 (1963) is called to mind:

> It savors almost of disrespect to the Virginia Supreme Court of Appeals, whose opinion manifests full awareness of the considerations that have traditionally marked the line between professional and unprofessional conduct, to read this part of its opinion otherwise.
>
> * * *
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> In my view, however, the statute as construed below is not ambiguous at all.
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> * * *
>
> *But even if the statute justly lent itself to the now attributed ambiguity, the Court should excise only the ambiguous part of it, not strike down the enactment in its entirety.* Our duty to respect state legislation, and to go no further than we must in declining to sustain its validity, has led to a doctrine of separability in constitutional adjudication. . .
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> * * *
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> . . . *[T]he kind of approach that the majority takes to the statute is quite inconsistent with the precept that our duty is to construe legislation, if possible, 'to save and not to destroy.'* *Id.* at 468-9 (Harlan, J., dissenting) (emphasis added).

Accepting the paramount interest in protecting freedom of speech from the "chilling effect" of overbroad state regulation, there are, nonetheless, "recurring indications in Supreme Court opinions that even in these civil rights and civil liberties cases absention might be appropriate if a state statute could easily be interpreted so as to avoid the constitutional question."[4]

This was, in fact, precisely what this Court did in *Dombrowski*. It authorized prompt and efficacious relief to the petitioners, yet offered the state a chance to determine the meaning and breadth of its own statute:

> Here, no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, and appellants are entitled to an injunction. *The State must, if it is to invoke the statutes after injunctive relief has been sought, assume the burden of obtaining a permissible narrow construction in a noncriminal proceeding before it may seek modification of the injunction to permit future prosecutions.* [footnote omitted].
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> * * *
>
> Although we hold today that appellants' allegations of threats to prosecute, if upheld, dictate ap-

4. Note, 59 Calif. L. Rev. 1549 (1971), citing, *e.g.*, Zwickler v. Koota, 389 U.S. 241, 248-49 (1967) (dictum); Dombrowski v. Pfister, 380 U.S. 479, 491 (1965) (dictum). *See also*, Askew v. Hargrave, 401 U.S. 476, 477-78 (1971) (per curiam); Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970) (per curiam); Reetz v. Bozanich, 397 U.S. 82 (1970). ". . . [*I*]*n Dombrowski v. Pfister*, the Court seemed to hold that whenever a vague or overbroad statute chilled free expression *and was not susceptible of a rehabilitating construction*, the *Douglas* test is satisfied and a federal *injunction prohibiting enforcement of the statute* is appropriate." 59 Calif. L. Rev. at 1560 (emphasis added).

propriate equitable relief without awaiting declaratory judgments in the state courts, *the settled rule of our cases is that district courts retain power to modify injunctions in light of changed circumstances. * * * Our view of the proper operation of the vagueness doctrine does not preclude district courts from modifying injunctions to permit prosecutions in light of subsequent state court interpretation clarifying the application of a statute to particular conduct.*

* * *

The record suffices, however, to permit this Court to hold that, *without the benefit of limiting construction,* the statutory provisions on which the indictments are founded are void on their face; *until an acceptable limiting construction is obtained, the provisions cannot be applied to the activities of SCEF, whatever they may be.* 380 U.S. at 490-7 (emphasis addded).[5]

Another *Younger* companion, *Perez v. Ledesma,* 401 U.S. 82 (1971), reemphasizes the sound principle, ignored by the court below, that an illicit use of a valid statute calls for *enjoining the constitutionally prohibited application, not striking down the entire enactment:*

Where the ground is bad-faith harassment, intervention is justified whether or not a state prosecution

5. The *amici curiae* maintain that a rehabilitating construction is easily obtainable in a single state criminal prosecution. As observed in Part II of this Brief, *infra,* Texas courts are well aware that Article 5154(d), is applicable only to labor picketing. In any event, even where such "single-prosecution" rehabilitation is found improbable, as in *Dombrowski, the Court has enjoined only the unconstitutional application to petitioners, not declared the statute irretrievably void.*

> is pending. *Intervention in such cases does not interfere with the normal good-faith enforcement of state criminal law by constitutional means, and does not necessarily require a decision on the constitutionality of a state statute. It simply prevents particular unconstitutional use of the State's criminal law in bad faith against the federal plaintiff.* Under *Douglas v. City of Jeanette, supra,* at 164, a person has no immunity from a state prosecution 'brought lawfully and in good faith,' but he is entitled to federal relief from a state prosecution which amounts to bad-faith harassment. [Footnote omitted]. *Id.* at 120 (emphasis added).

Expressions of this Court's unwillingness to allow blunderbuss attacks on state enforcement are legion.[6] In *City of Greenwood v. Peacock,* 384 U.S. 808 (1966), this Court, while citing *Dombrowski* and acknowledging the propriety of federal remedies, nonetheless emphasized the importance of selecting the particular federal remedy which will cure the ill without killing the patient.[7] It is this surgical excision technique which is so obviously lacking in the opinion of the panel below.

In addition to its disregard for the spirit of *Younger v. Harris, supra,* the district court further erred in its application of the *Younger* tests to Article 5154(d). The court below relied on findings of "bad faith" enforce-

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6. See Reetz v. Bozanich, 397 U.S. 82 (1970) and Fornaris v. Ridge Tool Co., 400 U.S. 41 (1970); and especially the dissenting opinion of Chief Justice Burger in Wisconsin v. Constantineau, 400 U.S. 433 (1971).

7. Remedies available include damage actions against state officials under 42 U.S.C. §1983, Monroe v. Pape, 365 U.S. 167 (1961) as well as criminal actions under 18 U.S.C. §241, U.S. v. Guest, 383 U.S. 745 (1966).

ment of various state criminal statutes such as Texas Penal Code Article 474, and laws governing unlawful assembly, disturbing the peace, trespassing and assault in voiding Article 5154(d). In only two instances does the district court even refer to Article 5154(d) as being an alleged basis of official action. In neither case does the court find that these actions were other than in good faith and within the "hard core" of activity prohibited by 5154(d).[8] The impropriety of this approach is patent, for the necessity of declaratory and injunctive relief with respect to Section 5154(d) must stand on its own. When one views the part played by Article 5154(d) in the alleged efforts to discourage the picketers' First Amendment rights, it at once becomes apparent that neither bad faith prosecution nor irreparable injury existed with respect to this Article.

With erroneous determinations of both prongs of the *Younger* test, the validity of the declaratory judgment striking down Article 5154(d) is called into serious question. The *amici curiae* herein respectfully urge that such declaration was reached in total disregard of the standards of judicial restraint formulated by this Court and must, accordingly, be vacated.

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8. On the first occasion, Capt. Allee merely "checked to make certain that the pickets were at least fifty feet apart and in accordance with Article 5154(d)." 347 F. Supp. at 615. No one has contended that on the second occasion, when the arrests occurred, the pickets were not in violation of the statute and presenting a threat to peace. *See* Dombrowski v. Pfister, 380 U.S. at 491-92.

II.

ARTICLE 5154(d), SECTION 1, IS A VALID LABOR STATUTE REGULATING THE MANNER IN WHICH THE RIGHT TO PICKET IS EXERCISED

Although the district court improperly elected to decide the merits of the constitutional challenge to Article 5154(d), its erroneous conclusion on the merits presents an equally compelling reason for vacating the judgment declaring unconstitutional the mass picketing statute. The reasonableness of the state regulation on mass picketing in labor disputes is revealed in the specific and carefully drawn definition of mass picketing contained in paragraphs 1 and 2 of Article 5154(d)(1). Paragraph 1 declares unlawful as mass picketing the congregating of more than two pickets within either 50 feet of any entrance to the premises being picketed or within 50 feet of any other picket or pickets. Paragraph 2, in order to ensure free access to premises subject to picketing, forbids the blocking by physical obstruction of free ingress and egress at the entrances of premises being picketed. The statute thus allows the facts involved in a labor dispute to be publicized adequately while, at the same time, those choosing to enter the premises subject to picketing are provided access without intimidation or impediment.

The court below, however, invalidated the statute on the ground that it is overbroad[9]—the conduct proscribed by the statute allegedly includes areas of protected freedoms.[10] The district court's decision ignores the funda-

9. 347 F. Supp. at 625.

10. *See* Hunter v. Allen, 422 F.2d 1158, 1161 (5th Cir. 1970).

mental policy of decisions of this Court that a state has a legitimate and substantial interest in regulating picketing of all types, including the right to place restrictions on the numbers of pickets and to protect the right of free ingress to and egress from establishments subject to picketing.[11] The *amici curiae* submit that the aspects of Article 5154(d) declared unconstitutional below conform to constitutional guidelines established by this Court.

A matter of fundamental importance to the present case is the failure of the court below to understand the basic purpose of the State of Texas in enacting Article 5154(d). The court distinguished between so-called "public" and "private" issue picketing and classified Article 5154(d) as a statute regulating "public" issue picketing. The court thus misconstrued the statute and overlooked the legitimate interest of the state in regulating labor disputes.

Contrary to the conclusion of the court below, Article 5154(d) was enacted and designed "to set the limits of permissible contest open to industrial combatants." *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940). This purpose is clear from the fact that the statute is contained in the section of the Texas statutes that regulates "labor organizations," and, further, every case decided pursuant to Article 5154(d), including the present case, has involved a labor dispute. The purpose of the State of Texas in promulgat-

11. *See* Cox v. Louisiana, 379 U.S. 536, 554-55, 577-78 (1965); Teamsters, Local 695 v. Vogt, 354 U.S. 284 (1957); Carpenters Union, Local 213 v. Ritter's Cafe, 315 U.S. 722, 738 (1942); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 297, 318-19 (1941); Thornhill v. Alabama, 310 U.S. 88, 99, 103-04 (1940); American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184, 206-07 (1921); Teller, *Picketing and Free Speech*, 56 Harv. L. Rev. 180 (1942).

ing the specific restrictions on mass picketing is set forth in the preamble to Article 5154(d):

> It is a matter of public knowledge that picketing as exercised by labor organizations is used only as a means of expression of ideas to the public generally, but likewise as a means of coercion, and conduct otherwise dangerous to the health, safety and general welfare of the people of Texas. . . . While it is necessary to safeguard the fundamental American rights of freedom of speech and assembly, it is likewise necessary to ensure the safety and general welfare of the people and to guarantee their right to engage in their daily pursuits without unlawful interference from others. . . .
>
> In order to safeguard the health, safety and general welfare of the people of Texas, it is necessary to regulate picketing.

Thus, any determination of the constitutional validity of the mass picketing statute must proceed on the basis that it is a narrowly drawn regulation designed to regulate *conduct*[12] in labor disputes. Moreover, decisions of this

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12. The distinction between pure speech and picketing has been stated as follows:

> While the decisions since *Thornhill* have been attacked as nearly negating its extension of first amendment protection to picketing, they can be justified on the ground that picketing 'is more than free speech,' that is, more than communication of facts and ideas. Although picketing may attempt to influence general attitudes or future political action, it also demands an immediate decision to respect or pass through the picket line. Those who refrain from crossing a picket line may do so not because of rational conviction but rather because of general uneasiness, embarrassment, or fear of getting involved or injured. The informational content of picketing is frequently small for picketing often communicates no more than the identity of the group and an assertion that it is aggrieved, without meaningfull-

Court make it clear that picketing, whether "private" issue or "public" issue, is conduct, and, as such, picketing is subject to regulation by the states.

That the court below erred, not only in classifying the type of conduct regulated by the mass picketing statute but also in concluding that the statute is unconstitutional, is demonstrated by the principles developed by this Court in the area of state regulation of peaceful picketing.[13] The opinion in *Thornhill v. Alabama, supra,* which was relied upon by the court below, sets forth the legitimate interest of the states in this area. The vice in *Thornhill,* as distinguished from the present case, was a *total* ban on all peaceful picketing. The statute thus was deemed unconstitutional because, instead of establishing limits on picketing, the statute prohibited all peaceful picketing:

> The statute as thus authoritatively construed and applied *leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity,* the peaceful character of their de-

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conveying to the public the 'nature and causes of a labor dispuite' as envisioned in *Thornhill.* Moreover, the target of picketing, the store or factory management, can seldom, if ever, communicate effectively by publicizing its version of the dispute, for in most cases the only feasible means of rebuttal is counter-picketing or handbilling, and the increased number of persons in front of an establishment may turn away even more potential customers. Picketing is usually designed to persuade its target not by appealing to his judgment but by causing economic loss. In short, the social policy favoring free exchange of ideas is often not served by picketing.

Note, *Freedom of Expression in a Commercial Context,* 78 Harv. L. Rev. 1191, 1208 (1965).

13. There is no question concerning the right to prohibit violent picketing. *See* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), where the Court upheld a state injunction that enjoined both violent *and* peaceful picketing.

> meanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

Id. at 99 (emphasis added).

The principles initially established in *Thornhill* have gradually been brought forward and clarified by this Court. The recurrent theme in these decisions is that the manner and means of regulating picketing are within the wisdom of the states, so long as a blanket prohibition of all picketing is avoided.[14] The clear distinction between pure speech and picketing is evident from Mr. Justice Frankfurter's opinion in the *Hanke* case.[15] There, the Court upheld a state injunction of peaceful picketing designed to gain an unlawful objective and indicated that wide deference should be given to state regulation:

> [*W*]*e must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech.* Our decisions reflect that picketing is 'indeed a hybrid.' . . . The effort in the cases has been to strike a balance between the con-

14. *See* Hughes v. Superior Court of California, 339 U.S. 460 (1950), where a state's regulatory control over picketing was delineated as follows:

> The policy of a State may rely for the common good on the free play of conflicting interest and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the form of legislation, *e.g.*, restraint of trade statutes, or be left to the *ad hoc* judicial process, *e.g.*, common law mode dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. *The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice. Id.* at 468 (emphasis added).

15. Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1950).

> stitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' *Thornhill v. Alabama,* 310 U.S. 88, 104. A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, *such judgment on these matters comes to this Court bearing a weighty title of respect.*

Id. at 474-75 (emphasis added). *See also Giboney v. Empire Storage Co.,* 336 U.S. 490, 498-500 (1949).

Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957), culminated the Court's decisions in this area. *Vogt* was described by the Court as "one more in a long series of cases in which this Court has been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing." *Id.* at 285. The Court concluded that this "long series of cases":

> [E]stablished a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.

Id. at 293. Encouragement of the effectuation of state policy in regulation of picketing announced in *Vogt* has caused this Court to "emphatically reject the notion" that the Constitution offers the same type of protection to picketing as it does to communication of ideas by pure

speech[16] and to conclude that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[17]

Application of the principles governing regulation of conduct involved in picketing to the specific paragraphs of Article 5154(d) declared unconstitutional reveals that the statute does not contravene constitutional guidelines. The authority of a state to establish limits on the number of individuals allowed to engage in picketing has never been questioned—the sole function of paragraph 1 of Article 5154(d) limiting picketing to not more than two pickets within 50 feet of entrances. The opinion in *Thornhill* expressly recognized the right to limit the number of persons allowed to engage in picketing.[18] At various times, this Court's decisions have alluded to the permissibility of

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16. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

17. *Id.* at 555, quoting from Giboney v. Empire Storage Co., *supra*. It is interesting to note that two leading exponents on the Court of the position that the freedom of speech is absolute and as such the states cannot place restrictions on it have never questioned the right to regulate picketing. In concurring in the *Cox* case, Mr. Justice Black stated: "Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." 379 U.S. at 578. Mr. Justice Douglas has stated:

> [P]icketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation.

Bakery Drivers Local v. Wohl, 315 U.S. 769, 776-77 (1942) (concurring opinion).

18. 310 U.S. at 99.

placing numerical limits on pickets, such as the following statement contained in the *Meadowmoor* case: "[Peaceful picketing] may, if actually necessary, be limited . . . to two or three individuals at a time and their manner of expressing their views may be reasonably restricted to an orderly presentation."[19]

In order to hold the picketing limitation in the Texas statute unconstitutional, however, the district court deemed it necessary only to "compare this statute with a Louisiana Municipal Ordinance found unconstitutional by the . . . Fifth Circuit in . . . *Davis v. Francois,* 395 F.2d 730 (5th Cir. 1968)".[20] The ordinance in the *Davis* case allowed only two pickets to be present at any time at the entire premises subject to picketing. The Fifth Circuit determined that the ordinance unduly restricted the right to protest because of the limitation of two pickets. The court below deemed the Texas statute a "mathematical straightjacket," and thus held it unconstitutional under mandate of the Fifth Circuit in *Davis.*

This mechanical application of the holding in *Davis* to the limitation of pickets contained in Article 5154(d)

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19. Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 319 (1941) (Reed, J., dissenting). The dissent by Mr. Justice Reed in *Meadowmoor* was prompted by the Court's allowance of total prohibition of peaceful picketing in a labor dispute. In Carpenters Union v. Ritter's Cafe, 315 U.S. 722 (1942), Mr. Justice Reed again dissented from the majority opinion, which approved total prohibition of peaceful picketing. This dissent, however, recognized the right of the state to:

> [I]mpose not only some but many restrictions upon peaceful picketing, reasonable numbers, quietness, truthful placards, open ingress and egress, suitable laws or other proper limitation, not destructive of the right to tell of labor difficulties, may be required. *Id.* at 738-39.

20. 347 F. Supp. at 624.

demonstrates the failure of the court below to perceive the true effect of the statute and illustrates the intrinsic flaw in its logic. There is a vast difference between the statutes—the Louisiana ordinance limits the number of pickets to two, while the Texas statute is a statutory regulation of labor disputes which allows two pickets at each entrance to the picketed premises and others properly spaced around the premises.[21] That the State of Texas struck the proper balance in preserving the public welfare in limiting the number of individuals allowed to picket in labor disputes was recognized by this Court long ago when, in delineating the purpose to be achieved by state legislation regulating picketing, the Court stated that, "The purpose should be to prevent the inevitable intimidation of presence of groups of pickets, but to allow missionaries."[22] There is no better vehicle for the effectuation of such purpose than the specific number and distance limitations on picketing contained in Article 5154(d).[23]

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21. The practical difference can be seen by reference to the facts in the Amicus Curiae Brief filed by Farah Manufacturing Company herein. The facts in the *Farah* case, now pending before this Court on a petition for writ of certiorari, reveal that 100 individuals, properly spaced, are able to picket a company facility without violating the numbers and distance requirements in Article 5154(d). Under the Louisiana ordinance, however, only two individuals would be allowed to picket, instead of the 100 allowed by the Texas statute. Brief for Farah Manufacturing Company as Amicus Curiae at 4 n. 2. The constitutionality of Article 5154(d) is also involved in the *Farah* case.

22. American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184, 207 (1921).

23. Professor Jerre Williams, in an analysis of the Texas mass picketing statute, concluded that the limitation on pickets is constitutionally proper:

> The Texas law with respect to picketing as free speech, it has been shown, is a close parallel to the law established by the federal decisions. . . . The Texas mass picketing statute limiting

Just as there is no question concerning the constitutional validity of the two-picket limitation in the statute, there has never been any question that a state may prevent picketing or any other conduct that obstructs entrances to picketed premises. This is the necessary effect of the provision requiring free ingress and egress contained in paragraph 2 of Article 5154(d). The plain language of the statute defines mass picketing as actual physical obstruction of entrances.[24] Yet, the court below struck down this part of the statute on the ground that it prevents "any character" of obstruction to free ingress or egress and as such is void for overbreadth.[25]

In *Cameron v. Johnson*, 390 U.S. 611 (1968), this Court determined that a Mississippi statute was not over-

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the number of pickets at each entrance of the establishment being picketed to two, has not been challenged in the courts. Nor has any similar statute of any other jurisdiction been challenged in the United States Supreme Court. However, the United States Supreme Court cases, starting with Thornhill v. Alabama, have recognized the right to limit the number of pickets. This seems to follow logically from the free speech pattern. By using a large number of pickets at any one entrance a union is accomplishing its objective through the coercion of numbers, the threat of physical force. Limiting the number of pickets so that the persons to be persuaded will not be threatened by the force of numbers but will be persuaded by the fact that the establishment is being picketed seems to be a perfectly proper and constitutional legislative control.

Williams, *Picketing and Free Speech—A Texas Primer*, 30 Texas L. Rev. 206, 226 (1951) (footnotes omitted).

24. Under the statute, mass picketing is deemed to exist where: Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises being picketed or to any other premises, *either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions*. (Emphasis added.)

25. 347 F. Supp. at 625.

broad which prohibited picketing in such a manner "as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises. . . ." Prohibition of this type of conduct—the obstruction or unreasonable interference with ingress or egress—was held not to abridge any constitutional liberty.[26]

The Distrit Court attempted to distinguish the present case from *Cameron* on the ground that the statute in *Cameron* prohibited *only* "unreasonable obstructions," while the Texas statute prohibits "any character" of obstruction to free ingress or egress.[27] The court thus suggests that pickets have a right to obstruct in a reasonable manner ingress and egress, which is certainly a novel constitutional doctrine. In any event, such a distinction between *Cameron* and the present case is illusory since the statute in *Cameron* prohibited conduct which obstructs *or* unreasonably interferes with ingress or egress, thus prohibiting *any* obstruction of entrances, instead of "unreasonable" obstruction. Similarly, the Texas statute prevents actual physical obstruction of entrances and thus is constitutional under the mandate of *Cameron.*

Added to the plain wording of the statute and the opinion in the *Cameron* case is the fact that the courts of the State of Texas have interpreted the second paragraph of Article 5154(d) to prohibit only physical obstructions of entrances—"a ruling on a question of state law that is as binding on [the Court] as though the precise words had been written into the ordinance."[28]

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26. 390 U.S. at 617.

27. 347 F. Supp. at 625.

28. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

In *Geissler v. Coussoulis,* 424 S.W.2d 709 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.), the court interpreted this section of the statute as prohibiting only the physical obstruction of ingress and egress. *Coussoulis* involved a strike in a city along the border of Texas and Mexico. The trial court enjoined the displaying of a red and black flag used in Mexico to signify that a strike is in progress. The trial court found that the display of the banner created an "obstacle to the free ingress and egress of plaintiff's business in violation of Sec. 1(2) of Article 5154(d)." *Id.* at 713. The appellate court, however, refused to sanction this holding because:

> The simple answer to this is that the statutory provision on which plaintiffs rely clearly *relates only to physical obstructions.* The statute talks solely in terms of an 'obstacle' formed by the person of the picket or by a vehicle or other 'physical' obstruction. One of the basic purposes of maintaining a picket line is to deter those sympathetic to the strikers' cause from dealing with the employer. If the picket line has the desired effect, there will be created in the minds of potential customers a disinclination to enter the strike-bound premises. If this psychological effect of a picket line is sufficient to brand it illegal as mass picketing, then the result of the statutory language is to prohibit all successful picketing. Such an interpretation would render the statute unconstitutional.

Id. at 714 (emphasis added).

Thus, under the authoritative construction of the Texas court limiting the operation of the statute to actual physical obstruction of ingress and egress and the mandate of this Court in *Cameron,* the provision of Article 5154(d) requiring open ingress and egress is a valid exercise of the police power of the State of Texas.

CONCLUSION

The decision of the three-judge court is a classic example of unwarranted invalidation of the authority of a state to impose reasonable regulations for the protection of the community as a whole. This fact is demonstrated by the failure of the court to exercise the required judicial restraint in deciding complex constitutional issues and the court's erroneous conclusion concerning the constitutionality of Article 5154(d). For these reasons, the *amici curiae* respectfully request this Court to vacate the district court's opinion declaring unconstitutional Section 1 of Article 5154(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 1973, one copy of the foregoing Brief Amicus Curiae was mailed, postage prepaid, to the following:

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APPENDIX A

Mr. John B. Abercrombie
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002

Dear Mr. Abercrombie:

This is in response to your letter dated April 11, 1973, requesting my consent to your filing a brief *amicus curiae* in the case of A. Y. Allee, et al., v. Francisco Medrano, et al., No. 72-1125, now pending in The Supreme Court of The United States. As attorneys for Dixie, Wolf & Hall, I hereby give such consent.

Very truly yours,

/s/ CHRIS DIXIE

THE ATTORNEY GENERAL
OF TEXAS

Austin, Texas 78711

(Seal of State of Texas)

John L. Hill
Attorney General

April 11, 1973

Mr. John B. Abercrombie
Baker & Botts
3001 Shell Plaza
Houston, Texas 77002

Re: Allee, et al v. Medrano, et al
No. 72-1125

Dear Mr. Abercrombie:

This is to confirm our telephone conversion of April 11, 1973, where I advised you that I was authorized to state to you that this office has granted consent to Brown & Root, et al to file a brief, as amicus curiae, in the above styled case.

Very truly yours,

/s/ GILBERT J. PENA
Assistant Attorney General

GJP:pa
cc: Mr. Chris Dixie
Dixie, Wolf & Hall
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Suite 401
Houston, Texas 77002

Mr. John B. Abercrombie
BAKER & BOTTS
3000 One Shell Plaza
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Dear Mr. Abercrombie:

This is in response to your letter dated April 11, 1973, requesting my consent to your filing a brief *amicus curiae* in the case of A. Y. Allee, et al., v. Francisco Medrano, et al., No. 72-1125, now pending in The Supreme Court of The United States. As attorneys for Jim Rochester, I hereby give such consent.

Very truly yours,

/s/ GARY GURWITZ

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Mr. John B. Abercrombie
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Dear Mr. Abercrombie:

This is in response to your letter dated April 11, 1973, requesting my consent to your filing a brief *amicus curiae* in the case of A. Y. Allee, et al., v. Francisco Medrano, et al., No. 72-1125, now pending in The Supreme Court of The United States. As attorneys for Dr. Rene Solis, Raul Pena, Roberto Pena and B. S. Lopez, I hereby give such consent.

Very truly yours,

/s/ LUTHER E. JONES, JR.
338 Laurel Drive
Corpus Christi, Texas 78404

Mr. John B. Abercrombie
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Dear Mr. Abercrombie:

This is in response to your letter dated April 11, 1973, requesting my consent to your filing a brief *amicus curiae* in the case of A. Y. Allee, et al., v. Francisco Medrano, et al., No. 72-1125, now pending in The Supreme Court of The United States. As attorneys for Star County officials, I hereby give such consent.

Very truly yours,

/s/ FRANK R. NYE, JR.